

THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

KATHERINE MOUSSOURIS, HOLLY
MUENCHOW, and DANA PIERMARINI,
on behalf of themselves and a class of
those similarly situated,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

Case No. 2:15-cv-01483-JLR

**PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION**

NOTE ON MOTION CALENDAR:
FEBRUARY 9, 2018

ORAL ARGUMENT REQUESTED

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STATUTES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e <i>et seq.</i>	1
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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Representative Plaintiffs Katie Moussouris and Holly Muenchow (“class representatives”) seek certification of a proposed Class of women who worked for Defendant Microsoft Corporation (“Microsoft”) in Stock Levels 59-67 in the Engineering and/or I/T Operations Professions in the United States from September 16, 2012 to the present.¹ All Class members have claims for systemic compensation discrimination, and Class members in levels 60-64 also have claims for systemic discrimination in promotions. Engineering and I/T Operations are the two technical Professions at Microsoft in which the class representatives worked.

As the evidence described herein shows, Microsoft has maintained a common, discriminatory pay and promotions process called, alternately, the Calibration or People Discussion Process (collectively “Calibration Process”) throughout the Class period. This Calibration Process results in lower pay and fewer promotions for women compared to their male peers. Plaintiffs allege that the Calibration Process is a specific employment practice that causes gender-based pay and promotion outcomes that violate the disparate impact provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (“Title VII”) and the Washington Law Against Discrimination, Rev. Code Wash. § 49.60.010. *et seq.* (“WLAD”). Plaintiffs also allege that Microsoft engages in a pattern or practice of intentional discrimination against women (disparate treatment) in violation of Title VII and WLAD.

Microsoft’s Calibration Process, which determines employees’ pay, promotion, and performance outcomes, is both unreliable—in that its structural features preclude consistent

¹ This Court held that the liability period for claims under the Washington Law Against Discrimination (“WLAD”) begins on September 16, 2012. *See* Dkt. 134 at 18. Additionally, the Court denied Microsoft’s motion to strike allegations of extraterritorial application of WLAD to Microsoft employees employed outside the state of Washington but subject to employment policies originating at Microsoft’s Washington headquarters. Dkt. 52 at 17-18. Accordingly, absent further order from the Court, the Class liability period begins September 16, 2012 for all Class members.

1 decision-making between comparable people—and based on invalid criteria. Plaintiffs’ expert
 2 Dr. Ann Marie Ryan, Professor of Organizational Psychology at Michigan State University,
 3 describes the common problems with this process.² Plaintiffs’ expert Dr. Henry Farber, Hughes-
 4 Rogers Professor of Economics at Princeton University, describes statistically significant and
 5 meaningful gender-based pay differentials caused by the Calibration Process. When controlling
 6 conservatively for relevant characteristics (including controls for job type, job complexity, and
 7 performance metrics), women earn less than their male counterparts.³ Dr. Farber also concludes
 8 that women have received over 500 fewer promotions than men with their same characteristics
 9 would have received.

10 The Calibration Process operates within the context of a corporate culture that
 11 systematically devalues women’s contributions. This is evidenced by the declarations of
 12 Plaintiffs and other female employees describing their experiences of gender discrimination in
 13 pay and promotions and Microsoft’s culture of bias; [REDACTED]
 14 [REDACTED]; and
 15 company records showing that Microsoft was well aware of the Calibration Process’s adverse
 16 impact on women and did not fix it. Instead, Microsoft has tried to sidestep this issue by
 17 publishing two misleading “pay equity studies” and pursuing diversity and inclusion (“D&I”)
 18 programs that its own HR professionals dismiss as mere window dressing.

19 Plaintiffs’ claims raise common questions of law and fact, the answers to which will
 20 drive the resolution of this litigation. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011).
 21 Plaintiffs seek certification of their claims for injunctive relief under Federal Rule of Civil
 22 Procedure 23(b)(2), certification of their claims for damages under 23(b)(3), and certification of

23 ² See Expert Report of Dr. Ann Marie Ryan (“Ryan”), filed herewith.

24 ³ The analysis of data through June 2016 reflects that in less than four years women in
 25 Engineering and I/T Operations have been underpaid between \$100-\$238 million, depending on
 26 whether job title is included in the model. See Expert Report of Dr. Henry Farber (“Farber”),
 filed herewith, ¶ 80 & Table 8. That number is expected to increase as further years of data are
 analyzed.

liability under 23(b)(2), (b)(3), and/or (c)(4). Below Plaintiffs include a proposed trial plan showing how their claims may be fairly and efficiently adjudicated on a class basis. Plaintiffs respectfully submit that their motion should be granted.

II. FACTS

A. Microsoft's Corporate Organization and Common Employment Practices

1. Microsoft's Job Classification System Organizes Employees Performing Similar Work By Profession, Discipline, and Job Title.

Microsoft is a multinational technology company headquartered in Redmond, Washington. Microsoft has a uniform system for organizing its employees throughout the United States. Whittinghill Tr. at 101:4-13.⁴ Microsoft classifies groups of employees doing similar work into Professions. *Id.* [REDACTED]
[REDACTED]
[REDACTED] MSFT_MOUSSOURIS_00688508 at 513. Within Professions, Microsoft classifies employees into subcategories called Disciplines, according to [REDACTED]
[REDACTED] Whittinghill Tr. at 102:16-103:4. Within each Discipline, the next and most specific level of organization is Standard Title, *id.* at 103:12-16, such as "Program Manager." The proposed Class includes employees in just two of Microsoft's Professions: Engineering and I/T Operations. Standard Titles in these Disciplines come in variations reflecting increasing levels of seniority, e.g.: I, II, Senior, and Principal.⁵ For instance: Program Manager (equivalent to "Program Manager I"), Program Manager II, Senior Program Manager, and Principal Program Manager. Regardless of which business organization they work in (such as Windows & Devices,

⁴ Evidence cited herein is attached to the Declaration of Anne B. Shaver in Support of Plaintiffs' Motion for Class Certification ("Shaver Decl."). All corporate documents are attached as collective Exhibit A in numerical order by Bates Number. Excerpts of Deposition Transcripts are attached as Exs. E to H, in chronological order by deposition date. Declarations and Reports in support of this Motion are submitted separately and referred to herein by last name of author.

⁵ Shaver Decl., Ex. B (Career Stage Profiles for Engineering and I/T Operations).

Office Products, etc.), employees are categorized by common Professions, Disciplines, and Standard Titles.

Two other aspects of Microsoft's corporate organization are relevant to this Motion. First, all employees are assigned to a pay band, called a Stock Level, [REDACTED].

Ritchie Tr. 521:2-14. [REDACTED]
[REDACTED]. Ritchie Tr. 308:6-13; MSFT_MOUSSOURIS_00688508 at 9.
[REDACTED]
[REDACTED]. Ritchie Tr. 521:13-14. [REDACTED]
[REDACTED]. *Id.* 416:1-3.

Second, employees are classified by Career Stage for purposes of guiding their career progress. Career Stages progress from 2 through 9, and are broken out separately for Independent Contributors ("IC"), Leads, and Managers. The Career Stages overlap with Standard Titles, such that, for example, a Program Manager I is Stage 2, a Program Manager II is Stage 3, a Senior Program Manager is Stage 4, and a Principal Program Manager is Stage 5.⁶

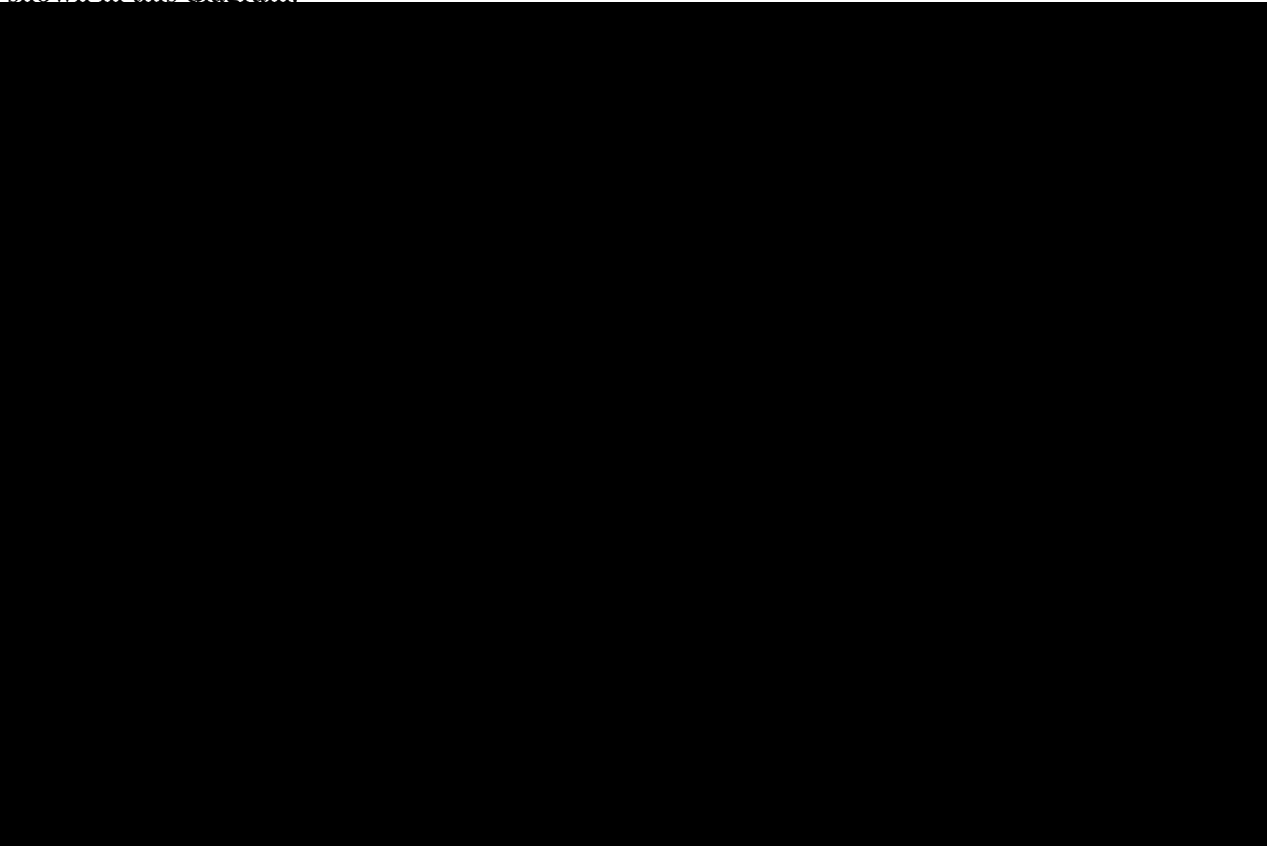
[REDACTED]
[REDACTED] Each Discipline shares a common set of competencies and key results.⁸

⁶ Shaver Decl., Ex. B.

⁷ MSFT_MOUSSOURIS_00187720 at 5. *See also* Whittinghill Tr. at 137:20-39:13 (explaining that key results areas are about skills and knowledge, whereas competencies are about behavior).

⁸ Shaver Decl., Ex. B.

Women are concentrated in the lowest levels of Engineering and I/T Operations, as shown in this diagram:⁹



2. Microsoft Has Used the Calibration Process Throughout the Class Period to Make Pay and Promotion Decisions.

The Calibration Process is a process in which managers compare employees within peer groups to determine performance, pay, and promotion outcomes. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁹ Farber Table 1. According to Microsoft's data, there are no employees in Levels 71-79. Accordingly, those levels are not represented in the diagram.

¹⁰ Ritchie Tr. at 136:25-138:22; 157:6-8; 229:16-17; 234:5-235:25.

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 Plaintiffs' expert in Organizational Psychology, Dr. Ryan, explains that problems with
 9 the process itself, as well as with the inputs to the process, undermine its reliability. Ryan, ¶ 25.
 10 First, regarding the process itself, Dr. Ryan found a lack of standardization in the types of
 11 information serving as inputs into compensation and promotion decisions, as well as in the
 12 specific procedures for discussing and making compensation and promotion decisions. *Id.*, ¶¶ 32-
 13 39. [REDACTED]
 14 [REDACTED]
 15 [REDACTED] *Id.*, ¶¶ 35-36, 39, & n.30.

16 Next, regarding the inputs to the process, Dr. Ryan found that decision makers were able
 17 to apply variable standards in making compensation and promotion decisions, because Microsoft
 18 did not prescribe weights to the underlying criteria. Ryan, ¶¶ 26-31. Thus, evaluators were free
 19 to weight criteria for pay and promotions in ways not aligned with job requirements. *Id.* Indeed,
 20 Dr. Ryan found that promotion decisions are not adequately linked to what Microsoft has stated
 21 are the job requirements in the Career Stage Profiles, so that there is no evidence that managers
 22 made decisions based on job related information. *Id.*, ¶¶ 17-24. Job performance, as measured
 23 by Microsoft's performance review process, likewise does not explain pay and promotion
 24 decisions. Farber ¶ 57.

25
 26 ¹¹ MSFT_MOUSSOURIS_00002269 at 2276.

1 Finally, Dr. Ryan notes that Microsoft does not adequately train managers or monitor to
 2 ensure the reliability and validity of outcomes in the Calibration Process. Ryan, ¶¶ 40-42. The
 3 training that is available to managers on these decisions does not provide instruction on how to
 4 weigh criteria in relation to the job requirements. *Id.*, ¶ 43. And Microsoft does not take steps to
 5 test inter-rater reliability, or whether manager decisions are *appropriately* calibrated such that
 6 managers apply the same standards consistently with each other. *Id.*

7 Dr. Ryan concludes that, “[o]verall, there is no evidence that compensation and
 8 promotion decisions are made reliably, and in fact, the processes contain numerous critical
 9 defects.” Ryan, ¶ 37.

10 3. Microsoft Pays Women Less Than Men for Substantially Similar 11 Work.

12 Compensation at Microsoft is determined as part of the Calibration Process. The data
 13 show that men and women perform equally well at Microsoft—that is, men’s and women’s
 14 performance review scores are roughly equal. Farber ¶ 57. Yet women are consistently paid
 15 substantially less than men in the same job title and with the same performance. Farber ¶ 5 &
 16 Table 3.

17 Dr. Farber’s pay regression controls for certain employee characteristics in order to
 18 compare employees who are similar to one another in relevant ways. His model controls for
 19 Profession, Discipline, Standard Title, age,¹² tenure,¹³ year, and location.¹⁴ Farber ¶¶ 53-56 &
 20 Table 3. The regression analysis shows that women are paid less than men, to a statistically
 21 significant level of 21.7 standard deviations. *Id.* This finding well exceeds the threshold of 1.96
 22 standard deviations to establish statistical significance that courts routinely accept as probative

23 _____
 24 ¹² Age is commonly used as a proxy for prior work experience where, as here, the employer’s
 25 data does not contain information about employees’ prior work experience. Farber ¶ 45.

¹³ Tenure is equivalent to years of experience at Microsoft. Farber ¶ 45.

¹⁴ Pay is based in part on geographic location to accommodate cost of living differences within
 26 the U.S., so Dr. Farber’s model accounts for that as well. Farber ¶ 45.

1 evidence of discrimination.¹⁵ The result is also practically significant given that the class
 2 shortfall value ranges from approximately \$100 million to \$238 million dollars, depending on
 3 whether standard title is included. *Id.*, ¶ 80 & Table 8.

4 Microsoft may argue [REDACTED], *see* § II.B.2, *infra*) that
 5 Dr. Farber's model is wrong because it does not control for Stock Level. However, Dr. Farber
 6 explains that it would be inappropriate to control for Stock Level for two reasons. First, stock
 7 level is a pay band, so regressing compensation based on Stock Level would simply be accepting
 8 pay as an explanation for pay, which is inappropriate. Farber ¶ 47. In other words, it is
 9 tautological that the observed gender pay gap would go to zero if stock level is included in the
 10 model; such an analysis merely confirms that Microsoft adheres to its pay bands and does not
 11 answer any question relevant to this case. Second, Dr. Farber has found that women are
 12 systematically assigned to lower Stock Levels than similar men; thus, controlling for Stock Level
 13 would lead one to underestimate the true pay gap. *Id.*, ¶¶ 48, 56 & Figure 3. In fact, in response
 14 to Microsoft's publication of two equal pay studies that controlled for Stock Level, over 30
 15 employees wrote to HR that [REDACTED]

16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED] *See* note 32 *infra*. In fact, Dr. Farber's model is overly conservative in

19 ¹⁵ *Bouman v. Block*, 940 F.2d 1211, 1225 n.1 (9th Cir. 1991) (accepting significance at the 5%
 20 probability level as probative of discrimination); *Eldredge v. Carpenters 46 N. Cal. Counties J.*
 21 *Apprenticeship & Training Comm.*, 833 F.2d 1334, 1340 n.8 (9th Cir. 1987) (holding that a
 22 probability level of 4.5%—*i.e.*, below 5%—gave “rise to an inference that the [challenged
 23 practice] rather than chance [was] responsible for” discrimination against women); *Paige v.*
 24 *California*, 233 F. App'x 646, 648 (9th Cir. 2007) (stating that “we have relied upon the 1.96
 25 standard deviation standard”—*i.e.*, a probability level of 5%—in discrimination cases); *Smith v.*
 26 *Xerox Corp.*, 196 F.3d 358 (2d Cir. 1999) (“If an obtained result varies from the expected result
 by two standard deviations, there is only about a 5% probability that the variance is due to
 chance. Courts generally consider this level of significance sufficient to warrant an inference of
 discrimination.”) (internal citations omitted) *overruled on other grounds by Meacham v. Knolls*
Atomic Power Lab., 461 F.3d 134, 141 (2d Cir. 2006); *Malave v. Potter*, 320 F.3d 321, 327 (2d
 Cir. 2003) (same).

1 that it controls for Standard Job title, which overlaps with and bakes in decisions about
2 employees' Career Stage and Stock Level.¹⁶

3 The observed gender-based pay differential in Engineering and I/T Operations has
4 existed across Microsoft locations throughout the United States to a statistically significant
5 degree throughout the entire class period. Farber Table 3. The proposed Class includes women
6 in Levels 59-67. While women at Levels 68 ("partner") and above may experience gender
7 discrimination in pay, employees at these levels participate in decision making within the
8 challenged process to an extent that likely would preclude their inclusion in the Class. Moreover,
9 there are relatively few women in these senior positions.

10 **4. Microsoft Promotes Men Over Similarly-Situated Women.**

11 Like compensation, promotions at Microsoft are determined in the Calibration Process.
12 Women in Engineering and I/T Operations obtain fewer promotions than men in the same job
13 and with the same characteristics and performance measures.

14 Dr. Farber's promotion regression (which is a probit model)¹⁷ controls for Profession,
15 Discipline, Stock Level,¹⁸ age, experience at Microsoft, location, and performance. Dr. Farber
16 finds that, between 2011-2016 (the last year data was available) women in Engineering and I/T
17 Operations received approximately 518 fewer promotions than would be expected given their
18 characteristics other than gender, and that the difference is statistically significant. Farber ¶ 77 &

19
20 ¹⁶ Standard Title is defined by Profession, Discipline and Career Stage Level. Career Stage
21 Level and Stock Level are intertwined; a Career Stage Level is generally defined as either two or
22 three Stock Levels within a particular Discipline. Farber ¶ 21. Women are in lower Career
23 Stages, and in lower Stock Levels within Career Stage. Farber ¶¶ 59-64 & Figures 1-3.

24 ¹⁷ A probit model is a form of multivariate analysis that can be used when the object of the study
25 is an outcome that takes on one of two discrete values—*e.g.*, promoted or not promoted. Dr.
26 Farber's probit model allows estimation of the difference in probability of promotion between
men and women. Farber ¶¶ 42-43.

¹⁸ Stock Level is not an appropriate control in the compensation regression for the reasons set
forth above in Section II.A.3. However, because Microsoft defines a promotion as a move from
one Stock Level to the next, in order to study advancement from one level to the next, one must
control for Stock Level in this probit regression. Farber ¶ 68.

Table 7. This is a properly specified model that controls for the relevant employee characteristics present in the data.

The proposed Class members with promotion claims include women in Levels 60-64. While the evidence suggests that women are also under-represented at Levels 65-67 (and above),¹⁹ the relatively small numbers of women at very senior levels means that even a small number of promotions can mask unfairness because the feeder pool of women available to be promoted to the next level is so small.

B. Microsoft Knew That the Calibration Process Disadvantaged Women in Pay and Promotions, But Did Nothing to Fix the Problem.

Microsoft knew from the internal and external sources described below that its Calibration Process had an adverse impact on women in Engineering and I/T Operations in terms of both compensation and promotion, but did nothing to remedy the problem.

1. On an Annual Basis, Microsoft Audited Pay and Promotion Decisions for Adverse Impact.

[REDACTED]

¹⁹ See, e.g., MSFT_MOUSSOURIS_00284174 at _191 (in Windows & Devices group, “L65+ Female representation is 20.6% pts below Overall female”).

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED] and must be aware the
 7 disparities in compensation and promotion identified here by Plaintiffs. Nevertheless, it has
 8 allowed these issues to persist uninterrupted. Further, as described by Dr. Ryan, the non-
 9 privileged “monitoring” that occurs—in other words, that which is shared with actual decisions-
 10 makers—is simply HR sitting in on Calibration meetings, and is woefully inadequate. Ryan,
 11 ¶¶ 40-43.

12 **2. The Federal Government Audited Microsoft’s Data** [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]

25 ²⁰ MSFT_MOUSSOURIS_00065719.

26 ²¹ MSFT_MOUSSOURIS_00801714.

²² MSFT_MOUSSOURIS_00801714 at 0008-9.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
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13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

²³ MSFT_MOUSSOURIS_00801714 at 0008.

²⁴ MSFT_MOUSSOURIS_00308243 at 248-49.

²⁵ MSFT_MOUSSOURIS_00802741 at 0001.

²⁶ MSFT_MOUSSOURIS_00801714 at 009.

²⁷ MSFT_MOUSSOURIS_00801714 at 010 (emphasis in the original).

²⁸ *Id.*

²⁹ *Id.*

3. **Employee Responses to Microsoft's Equal Pay Announcements Gave Microsoft Notice of Widespread Concerns of Pay and Promotion Bias.**

Microsoft received substantial employee reaction to two equal pay announcements during the class period. First, after CEO Satya Nadella made headlines for statements he made at the 2014 Grace Hopper Institute (women in technology conference) about equal pay being a function of "karma",³⁰ he sent a clarifying email to employees claiming that "the overall differences in base pay among genders and races (when we consider level and job title) is consistently within 0.5% at Microsoft." MSFT_MOUSSOURIS_00017963. In response, employees swamped Microsoft's leadership team and HR with messages telling the company that

MSFT_MOUSSOURIS_00563277.

³⁰ Satya Nadella responded to a question on what advice he would offer women who are not comfortable asking for pay raises: "It's not about asking for the raise, but knowing and having faith that the system will actually give you the right raises as you go along. . . . And that, I think might be one of the additional superpowers that quite frankly women who don't ask for a raise have. Because that's good karma." See <https://news.microsoft.com/2014/10/09/satya-nadella-email-to-employees-re-grace-hopper-conference/>.

³¹ Ritchie Tr. at 393:24-394:11.

MSFT_MOUSSOURIS_00150735 at 739.

The response was the same when Microsoft released the results of its April 2016 Equal Pay Study. The study was undertaken in response to pressure from shareholder Arjuna Capital, which threatened Microsoft (and other technology companies) with a shareholder resolution forcing it to disclose pay data. Microsoft decided to make a large public announcement about its pay data in April 2016. MSFT_MOUSSOURIS_00592294. Unfortunately, again Microsoft simply asserted that women earn 99.9 cents to men's dollar when comparing employees in the same job title and Stock Level.³³

³² See, e.g., MSFT MOUSSOURIS 00562093.

Kathleen Hogan, Ensuring equal pay for equal work, Official Microsoft Blog (Apr. 11, 2016), <https://blogs.microsoft.com/blog/2016/04/11/ensuring-equal-pay-equal-work/>.

³⁴ These responses are too numerous to catalog here; they are listed in a chart at Shaver Decl., Ex B for the Court's reference. Some representative examples include: MSFT MOUSSOURIS 00744109 at 109-110

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[REDACTED]

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[REDACTED]

³⁶ MSFT_MOUSSOURIS_00775226 at 227.

³⁷ MSFT_MOUSSOURIS_00705352 at 353.

³⁸ MSFT_MOUSSOURIS_00744107.

³⁹ MSFT_MOUSSOURIS_00806770.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Microsoft was well aware of the persistent gender-based pay and promotion disparities from its own internal audits. Instead of being candid with its employees, investors, and the public, Microsoft cooked the analysis by adding stock level—*i.e.*, a pay band—to claim success. Many of its own employees knew the truth: the pay studies were a sham.

4. Knowledge of Gender Bias Went to the Very Top of Microsoft.

Microsoft's leadership Senior Leadership Team (SLT), which consists of CEO Satya Nadella and the Executive Vice Presidents ("EVPs") who report to him, routinely observed gender bias and culture problems at Microsoft. In Mr. Nadella's company email clarifying his

³⁹ MSFT MOUSSOURIS 00797920 at 922-923 [REDACTED]

See, e.g., MSFT MOUSSOURIS_00784718; MSFT MOUSSOURIS_00705901 at _902; MSFT MOUSSOURIS_00592294; MSFT MOUSSOURIS 00714794; MSFT MOUSSOURIS 00744437. [REDACTED]

MSFT MOUSSOURIS_00418344.

1 statements at the 2014 Grace Hopper Institute, Mr. Nadella acknowledged three areas in which
 2 Microsoft needed to make progress: 1) “we must ensure not only that everyone receives equal
 3 pay for equal work, but that they have the opportunity to do equal work”; 2) “we need to recruit
 4 more diverse talent to Microsoft at all levels ... These numbers are not good enough ... and
 5 especially in engineering”; and 3) “we need to expand training for all employees on how to foster
 6 an inclusive culture.”⁴¹ Mr. Nadella has stressed that [REDACTED]

12 [REDACTED]
 13 This has not generated appropriate interventions to address known problems. For example, the
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]

23 ⁴¹ MSFT_MOUSSOURIS_00017963.

24 ⁴² MSFT_MOUSSOURIS_00563277.

24 ⁴³ MSFT_MOUSSOURIS_00678321 at 326.

25 ⁴⁴ MSFT_MOUSSOURIS_00825924 at 928; *see also id.* at 925 ([REDACTED])
 26 [REDACTED].

1 MSFT_MOUSSOURIS_00278390 at p. 8. Other records similarly reflect that knowledge of
 2 Microsoft's institutional biases and the way the company masks them went to the very top of the
 3 organization. For example, [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 MSFT_MOUSSOURIS_00677331 at pp. 16, 19, 24, 25, 34. [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]⁴⁵

17 In sum, Microsoft's senior leadership knew from multiple sources that it had a pay and
 18 promotion problem, but failed to remedy the systemic bias against women as [REDACTED]

19 [REDACTED] MSFT_MOUSSOURIS_00278390
 20 at p. 8.

21
 22
 23
 24
 25 ⁴⁵ MSFT MOUSSOURIS_00022538 at 540. *See also* MSFT MOUSSOURIS_00201435 ([REDACTED])

1 **C. Microsoft Has Ignored Overwhelming Evidence of Intentional Gender**
2 **Discrimination and Maintained a Company Culture Biased Against Women.**

3 Microsoft's discriminatory processes do not operate in a vacuum, but instead are shaped
4 by a common culture of gender stereotyping and bias against women at the company. The
5 evidence of intentional discrimination is substantial, from many different sources, which
6 separately and collectively show Microsoft's pattern and practice of gender bias and bring "the
7 cold numbers convincingly to life." *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 339
8 (1977). This evidence includes internal complaints by female employees submitted to
9 Microsoft's Employee Relations Investigations Team ("ERIT"), comments made by employees
10 in the Microsoft Poll Survey, civil lawsuits and gender discrimination charges filed against
11 Microsoft with governmental agencies, and documentary evidence such as corporate emails and
12 records reflecting persistent biases and systemic problems for women.

13 This constellation of evidence reflects the following themes: 1) an exclusionary "boys
14 club" atmosphere; 2) a culture rife with sexual harassment; 3) a near-total failure of HR to
15 properly investigate and redress employee complaints of discrimination and harassment; and 4)
16 acknowledgment that Microsoft's diversity and inclusion (D&I) initiatives are mere window-
17 dressing and have failed to address the underlying problems. This common, classwide evidence
18 shows that Microsoft "operated under a general policy of discrimination." *Dukes*, 564 U.S. at
19 353.

20 **1. Microsoft Maintains an Exclusionary "Boy's Club" Atmosphere.**

21 Like every other large company in the United States, Microsoft has a written policy
22 against gender discrimination and sexual harassment. Microsoft does not follow its policy.

23 Microsoft women have reported to senior leadership that Microsoft maintains an abusive,
24 toxic, "boy's club" atmosphere, where women are ignored, abused, or degraded. *See, e.g.,*
25 MSFT_MOUSSOURIS_00792417 at 419 ([REDACTED])
26

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

⁴⁶ See also Boeh Decl., ¶ 7 (culture is “unfriendly toward women”); Dove Decl., ¶ 7 (“Women and their perspectives are undervalued at Microsoft. On many occasions I have experienced or witnessed women being cut off in meetings, excluded from meetings, and our opinions dismissed or undervalued.”); Muenchow Decl., ¶ 6 (“Women are held to a different standard than men: when they speak up in meetings, they receive negative criticism for being too aggressive, but men routinely talk over women without criticism.”); Moussouris Decl., ¶ 6 (“Women were frequently interrupted or talked over at meetings. I saw on several occasions that women who shared their ideas were ignored, but that the same or similar ideas later presented by men would be acknowledged and congratulated.”); Smith Decl., ¶ 7 (“The men I worked with created a ‘good ol’ boy’s club’ atmosphere, where the men often socialized and drank together. As a

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Even Microsoft's Unconscious Bias training is prey to the culture of bias and stereotyping that it purports to correct. [REDACTED]

[REDACTED] MSFT_MOUSSOURIS_00166305 at 307-308. *See also*

MSFT_MOUSSOURIS_00371657 [REDACTED]

[REDACTED]; Muenchow Decl., ¶ 7 (same).

2. Microsoft's Culture is Rife With Sexual Harassment.

Company records indicate that women at Microsoft are sexualized by their male managers and coworkers, leading to a substantial number of incidents of alleged sexual harassment, and even several incidents of sexual assault, that often go unpunished. [REDACTED]

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woman, I felt objectified and excluded."); Sowinska Decl., ¶ 7 ("I frequently heard stories, and shared my own experiences, regarding women's contributions being undervalued and women being denied professional development opportunities. . . . I also spoke with women about the pressure we felt to hit the sweet spot between being perceived as 'too timid' or 'overly passionate' and 'too harsh' in Microsoft's male dominated culture."); Underwood Decl., ¶ 6 ("I was marginalized, excluded, denied resources, and treated differently than my male peers."); Vaughn Decl., ¶ 6 ("I am often excluded from meetings I should attend, and more senior male employees refuse to respond to my correspondence."); Warren Decl., ¶ 7 ("[M]en are praised for exhibiting strong opinions and being assertive, while women are admonished for the same behavior.").

⁴⁷ MSFT_MOUSSOURIS_00341320 at 321.

⁴⁸ The two Employee Relations Investigations Team complaint logs produced by Microsoft are attached to the Shaver Declaration as Exhibit C.

Smith Decl., ¶ 7 (“[M]ale co-workers frequently commented on my looks and figure and made inappropriate comments about other women’s looks. These comments occurred nearly constantly, even on conference calls before meetings began.”); Sowinska Decl., ¶ 7 (describing frequent incidents of sexual harassment and strategizing with another manager “regarding his concerns about sending a female employee to meetings with senior IT employees who failed to pay attention to her and obviously stared at her breasts”); Warren Decl., ¶ 7 (“Microsoft’s Xbox team hosted a party in spring of 2015 that included scantily clad women dancing on tables, which was widely praised by the men in my office.”).

The [REDACTED] The flagrant and repeated incidents of sexual misconduct toward women at Microsoft reflects the corporate culture in which women are undervalued and underpaid.

3. Microsoft Does Not Appropriately Investigate or Redress Employee Complaints of Discrimination and Harassment.

1 [REDACTED]
 2 [REDACTED] complaints lodged with
 3 HR by professional women making careers at a Fortune 50 company is shocking enough, what is
 4 even more disappointing is the lackluster response to the issues raised by the Microsoft team
 5 (“ERIT”) tasked with investigating complaints of Microsoft’s anti-discrimination and anti-
 6 harassment policy. [REDACTED]

14 ⁴⁹ Shaver Decl., Ex. C.

15 ⁵⁰ Shaver Decl., Ex. C.

16 ⁵¹ See also Alberts Decl., ¶ 8 (“I have no idea whether HR investigated my complaint, as HR
 17 never followed up. I believe that complaining to HR can be career-ending at Microsoft and I only
 18 did so because I saw no other option short of leaving the company, which I did when HR did
 19 nothing.”); Boeh Decl., ¶ 5,8 (HR ignored multiple complaints of discrimination, including when
 20 manager explicitly stated he denied her a promotion because he did not want to waste it on
 21 someone who might become pregnant); Dove Decl., ¶ 9 (ERIT found no violation after
 22 complaint of gender discrimination and told her it was technically impossible to remove unfair
 23 comments from her performance review; “This is not plausible at a tech company.”); Hutson
 24 Decl., ¶ 6 (for first complaint, “HR never followed up with me”; for second complaint, “despite
 25 telling me that my manager acted inappropriately, ERIT found no violation”); Miller Decl., ¶ 9
 26 (complaining to HR “will not make any difference and will only subject the complainants to
 hostility and retaliation”); Muenchow Decl., ¶ 7 (“[M]aking complaints about discrimination to
 Microsoft’s [HR] department does not make any difference.”); Moussouris Decl., ¶ 7 (HR took
 no action on multiple complaints of discrimination and retaliation); Smith Decl., ¶ 9 (“HR sent a
 single email to my work email while I was out of the office and never attempted to reach me
 again, even after I followed up with them upon my return.”); Underwood Decl., ¶ 9 (“ERIT
 collected information from me, but I did not see them take any action to address the
 discrimination. The multiple complaints I made did nothing to improve the hostility I and other
 women faced.”); Vaughn Decl., ¶ 7 (After complaining that male co-workers with less

Footnote continued on next page

1 In fact, ERIT often concludes there is no policy violation even when all the evidence
2 points to the contrary. [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 *Footnote continued from previous page*

25 experience were earning more, “HR told me there was nothing they could do.”).

26 ⁵² MSFT_MOUSSOURIS_00816432.

⁵³ MSFT_MOUSSOURIS_00632037 at 042.

[REDACTED]

⁵⁴ MSFT_MOUSSOURIS_00064918 at 929.
⁵⁵ MSFT_MOUSSOURIS_00064918 at 930.
⁵⁶ MSFT_MOUSSOURIS_00059215 at 217.
⁵⁷ MSFT_MOUSSOURIS_00865592 at 597.

4. **Microsoft Fails to Train Employees on Basic Principles of Anti-Harassment/Discrimination or Managers regarding Complaints.**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5. **Microsoft Knows its D&I Programs are Little More than Window-Dressing that Fail to Produce Meaningful Results.**

Internally, HR employees acknowledge that Microsoft's D&I initiatives are little more than window dressing and do not affect the underlying problems. MSFT_MOUSSOURIS_00677712 at 713 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁵⁸ MSFT_MOUSSOURIS_00859406 at 425.

1 Employees within the D&I department, who are tasked with reporting out progress on
 2 D&I for their organizations over time, similarly express frustration at the lack of impact their
 3 programs make. MSFT_MOUSSOURIS_ 00259655 at 656 [REDACTED]

4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]

16 In sum, Microsoft has long been aware of the gender discrimination against female
 17 employees, has not remedied the problem, and instead has focused its efforts on misleading
 18 announcements about pay equity and unproductive D&I initiatives that merely check the box on
 19 commitment.

20 **III. ARGUMENT**

21 **A. Legal Standards**

22 **1. Federal Rule of Civil Procedure 23**

23 The Court may certify a class if the requirements of Federal Rule of Civil Procedure
 24 23(a) are met, along with one of the prongs of Rule 23(b). *Dukes*, 564 U.S. at 344. Although “a
 25 court’s class-certification analysis must be rigorous and may entail some overlap with the merits
 26 of the plaintiff’s underlying claim, Rule 23 grants courts no license to engage in free ranging

merits inquiries at the certification stage.” *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013) (quoting *Dukes*, 564 U.S. at 351) (quotation marks omitted). *See also id.* at 1195 (“Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.”).

Here, Plaintiffs seek certification of their claims for injunctive relief under 23(b)(2), for monetary damages under 23(b)(3), and for liability under 23(b)(2), (b)(3), and/or (c)(4) of the following class:

All women who have worked at Microsoft within the Engineering and/or I/T Operations Professions in the United States at any time from September 16, 2012 to the present in Stock Levels 59 to 67, inclusive.

As described below, Plaintiffs readily satisfy the standards for certification.

2. Liability Under Title VII and WLAD

To determine whether the requirements of Rule 23 are met, the Court must first look to the elements of the underlying substantive claims. *Parsons v. Ryan*, 754 F.3d 657, 676 (9th Cir. 2014); *Stockwell v. City & Cty. of San Francisco*, 749 F.3d 1107, 1114 (9th Cir. 2014). Here, Plaintiffs bring class claims for disparate impact and disparate treatment under Title VII and WLAD. The claims under both statutes are co-extensive and Plaintiffs’ arguments herein apply to both. *Oliver v. Pac. Nw. Bell Tel. Co.*, 106 Wash. 2d 675, 678 (1986) (finding that disparate impact and treatment theories are available under WLAD, and that WLAD “is patterned after Title VII” and “decisions interpreting the federal act are persuasive authority for the construction of [WLAD]”). “Generally, litigation of both disparate treatment and disparate impact claims are divided into two phases: liability and remedial.” *Williams v. Boeing Co.*, 225 F.R.D. 626, 634 (W.D. Wash. 2005).

1 **a. Disparate Impact Liability**

2 “Disparate impact claims assert that the employer has a facially neutral policy or practice
3 that causes a disparate impact on a protected group, even if the employer has no intent to
4 discriminate.” *Williams*, 225 F.R.D. at 634 (citation omitted). To establish a prima facie case of
5 disparate impact, a plaintiff must “identif[y] the specific employment practice that is
6 challenged,” “show that there are statistical disparities in the employer’s work force,” and the
7 “statistical disparities must be sufficiently substantial that they raise such an inference of
8 causation.” *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988). If the prima
9 facie case is established, the burden shifts to the employer to show that its employment practices
10 are based on legitimate business reasons, and that there was no less discriminatory alternative.
11 *Id.* at 998; *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 505 (2012). This is commonly
12 referred to as the “liability phase.”

13 If liability is established, the entire class is entitled to a presumption of make whole
14 relief. *Ellis*, 285 F.R.D. at 505. A class member seeking relief “need only show that he or she
15 suffered an adverse employment action and therefore was a potential victim of the proved
16 discrimination. After such a showing, the employer bears the burden of persuading the trier of
17 fact that its decision was made for lawful reasons; otherwise, the employee is entitled to
18 individualized relief[.]” *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 151 (2d Cir. 2012)
19 (citations and alterations omitted). This is commonly referred to as the “remedial” or “damages”
20 phase.

21 **b. Disparate Treatment**

22 Disparate treatment claims arise where the employer “utilizes a pattern or practice of
23 intentional discrimination” such that it is “the employer’s standard operating procedure.”
24 *Williams*, 225 F.R.D. at 634. In contrast to disparate impact claims, “disparate treatment does
25 not require the identification of a specific employment policy responsible for the discrimination.”
26 *Rollins v. Traylor Bros.*, No. C14-1414 JCC, 2016 WL 258523, at *7 (W.D. Wash. Jan. 21,

2016) (citing *Brown v. Nucor Corp.*, 785 F.3d 895, 915 (4th Cir. 2015)).⁵⁹ It does, however, require “significant proof” that Defendants “operated under a general policy of discrimination.” *Dukes*, 564 U.S. at 353. Significant proof of such a policy can be shown entirely through statistics and anecdotal evidence that demonstrate “a pattern of discrimination.” *Rollins*, 2016 WL 258523, at *7; *Beck v. Boeing Co.*, 60 F. App’x 38, 39 (9th Cir. 2003) (stating plaintiffs may establish prima facie case “through statistics alone”).⁶⁰ If the prima facie case is established, the burden shifts to the employer to “demonstrate that the plaintiffs’ statistical evidence ‘is either inaccurate or insignificant.’” *Id.* (quoting *Teamsters*, 431 U.S. at 360). Whoever prevails on the preponderance of the evidence wins the liability phase.

If plaintiffs prevail, they are entitled to “a rebuttable inference that all class members were victims of the discriminatory practice, [which] will justify ‘an award of prospective relief’ such as ‘an injunctive order against the continuation of the discriminatory practice.’” *Dukes*, 564 U.S. at 352 n.7 (quoting *Teamsters*, 431 U.S. at 361). “If individual relief is sought, as it is here, ‘a ‘district court must usually conduct additional proceedings to determine the scope of individual relief.’ At this phase, the burden of proof will shift to the company, but it will have the right to raise any individual affirmative defenses it may have, and to ‘demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.’” *Id.* (quoting *Teamsters*, 431 U.S. at 361-62). This is the “damages phase” in the disparate treatment case.

B. Plaintiffs’ Disparate Impact and Disparate Treatment Claims Satisfy Rule 23(a).

Rule 23(a) requires that: “(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or

⁵⁹ *Rollins* was subsequently decertified for failure to satisfy the numerosity requirement. 2016 WL 5942943 (W.D. Wash. May 3, 2016).

⁶⁰ See also *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977) (“Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.”).

defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a). Together, these requirements seek to “limit the class claims to those fairly encompassed by the named plaintiff’s claims.” *Dukes*, 564 U.S. at 349.

1. The Class Is Sufficiently Numerous.

While there is no threshold number of class members required, “[g]enerally, 40 or more members will satisfy the numerosity requirement.” *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1326-27 (W.D. Wash. 2015). The question is whether joinder of all potential plaintiffs would be impracticable. *Id.* Here, there are approximately 8,630 proposed Class members, readily satisfying this requirement. Farber ¶ 11.

2. There Are Common Questions of Law and Fact That Will Drive the Resolution of Plaintiffs’ Claims.

To satisfy commonality, class members’ claims must share common questions of fact or law that are “capable of class wide resolution.” *Dukes*, 564 U.S. at 350. A contention is capable of classwide resolution if “the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Id.* Commonality poses a “limited burden” because it “only requires a single significant question of law or fact.” *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012).

a. Disparate Impact Commonality

Plaintiffs’ disparate impact claim raises the common questions of whether Microsoft’s Calibration process has a disparate impact on women in pay and promotions. These questions are capable of class wide resolution because a determination—yes or no—will establish whether plaintiffs have met their prima facie case of disparate impact. If they have, two other significant common questions arise: whether the practice is based on business necessity and whether there is a less discriminatory alternative. Together, the answers to these common questions will establish or defeat liability for the Class.

As other courts have held, commonality is easily satisfied in these circumstances. For instance, in *Ellis*, the plaintiffs challenged “specific employment practices within Costco’s promotion system,” such as a tap-on-the-shoulder appointment process, a lack of posting for open positions, and reliance on common but unvalidated criteria for assessing candidates. 285 F.R.D. at 531. The court held that, “Plaintiffs’ argument—that such companywide practices lead to disparate outcomes—is a common question subject to classwide proof and rebuttal.” *Id.* Similarly, in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012), the plaintiffs alleged that their employer’s teaming and account distribution policies caused an adverse impact on African American brokers. The court found that, “whether [the teaming policy] causes racial discrimination and whether it nonetheless is justified by business necessity are issues common to the entire class and therefore appropriate for class-wide determination. And likewise with regard to account distributions.” *Id.* at 489. *See also Parra v Bashas’, Inc.*, 291 F.R.D. 360, 375 (D. Ariz. 2014) (where, like here, company used common pay scales to vary pay for white employees versus comparable Hispanic employees causing disparate impact on Hispanic employees, commonality satisfied because “if a trier of fact finds that Bashas’ wage scales lead to disparate outcomes, that is a common question subject to classwide proof and rebuttal”) (citing *Ellis*, 285 F.R.D. at 531). As these authorities make clear, Plaintiffs’ disparate impact claims raise common questions that will “generate common answers apt to drive the resolution of the litigation.” *Dukes*, 564 U.S. at 350.

b. Disparate Treatment Commonality

Plaintiffs’ disparate treatment claim raises the common question of whether discrimination was Microsoft’s “standard operating procedure,” to be shown through “significant proof” that Microsoft “operated under a general policy of discrimination.” *Dukes*, 131 S. Ct. at 2553. This question is capable of class wide resolution because its determination—yes or no—will establish whether plaintiffs have met their prima facie case of disparate treatment. If they have, another significant common question arises: whether Plaintiffs’ statistical evidence “is

1 either inaccurate or insignificant.” *Beck*, 60 F. App’x at 39. Together, the answers to these
 2 common questions will establish or defeat liability for the Class.

3 Here, Plaintiffs’ evidence of a general policy of discrimination is substantial, including:
 4 1) statistically significant evidence of discrimination in the common Calibration process; 2)
 5 evidence that Microsoft’s senior leadership knew of the pay and promotion disparities and yet
 6 did not fix the problem; and 3) evidence that Microsoft has a corporate culture hostile to women,
 7 and that the HR organizations tasked with investigating and curbing discrimination failed at both.

8 Other courts have relied on the same categories of evidence to support a finding of
 9 commonality for a disparate treatment claim. *See, e.g., Ellis*, 285 F.R.D. at 510-531 (finding
 10 commonality satisfied with “significant proof that the entire class was subject to the same
 11 allegedly discriminatory practices,” falling into three categories: common promotions practices
 12 relying on common criteria, a companywide culture, and statistical evidence of gender
 13 disparities); *Rollins*, 2016 WL 258523 at *7-10 (finding commonality satisfied by substantial
 14 anecdotal evidence of discrimination in the workplace and statistical evidence of racial
 15 disparities); *Brown v. Nucor Corp.*, 785 F.3d 895, 914 (4th Cir. 2015) (same) (“[T]he workers’
 16 statistical and anecdotal evidence, especially when combined, thus provide precisely the ‘glue’ of
 17 commonality that *Wal-Mart* demands.”); *Beck v. Boeing*, 203 F.R.D. 459, 464 (W.D. Wash.
 18 2001) (“[S]tatistically significant results of adverse impacts on female employees in every
 19 facility and at every level within the Puget Sound area [] establishes sufficient indicia of class-
 20 wide disparate treatment to satisfy the certification criteria of commonality and typicality.”),
 21 *vacated in part on other grounds*, 60 F. App’x 38 (9th Cir. 2003). The evidence proffered here is
 22 on par with or more substantial than these and other cases finding commonality.

23 **3. The Representative Plaintiffs’ Claims Are Typical of the Class** 24 **Claims.**

25 “Under the rule’s permissive standards, representative claims are ‘typical’ if they are
 26 reasonably co-extensive with those of absent class members; they need not be substantially

identical.” *Parsons*, 754 F.3d at 685 (quotation marks and citations omitted). “Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought.” *Id.* (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)).

Here, Representative Plaintiffs Moussouris and Muenchow both worked in the Engineering profession during the class period, and Plaintiff Muenchow worked in the I/T Operations profession as well. More importantly, the nature of their claims is co-extensive with the class claims for discrimination in pay and promotions. Plaintiff Moussouris alleged that Microsoft paid her less than her male peers throughout her tenure at the company and discriminated against her in the promotion process. Sec. Am. Compl., ¶¶ 65-68; *see also* Moussouris Dec., ¶¶ 3-5. For example, “[f]rom 2010 to 2014, Microsoft passed her over for promotions in favor of less qualified and less experienced men.” Sec. Am. Compl., ¶¶ 66-68; *see also* Moussouris Dec., ¶ 4. Similarly, Ms. Muenchow alleges that she has been paid less than comparable male coworkers and that men have been promoted to higher levels for which she was qualified and not considered. Sec. Am. Compl., ¶¶ 75-76; *see also* Muenchow Dec., ¶¶ 3-4.⁶¹ Typicality is satisfied.

4. The Representative Plaintiffs and Class Counsel Will Adequately Protect the Interests of the Class.

To determine whether Representative plaintiffs will adequately represent a class, courts must resolve two questions: ““(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?”” *Ellis*, 657 F.3d at 985 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)). Here, neither the Representative Plaintiffs

⁶¹ *See also* Alberts Decl., ¶¶ 5-6; Boeh Decl., ¶¶ 5-6; Dove Decl., ¶¶ 5-7; Hutson Decl., ¶ 5; Miller Decl., ¶¶ 5-6; Smith Decl., ¶¶ 5-6; Sowinska Decl., ¶¶ 5-6; Underwood Decl., ¶ 5; Vaughn Decl., ¶ 5; Warren Decl., ¶¶ 5-6 (collectively describing experiencing discrimination in pay and promotions).

nor their counsel have any conflicts of interest with the Class; to the contrary, their interests in remedying the systemic gender discrimination at Microsoft are directly aligned with the interests of the Class. Also, the Representative Plaintiffs and counsel have demonstrated that they will vigorously prosecute this action on behalf of the Class. The Representative Plaintiffs have demonstrated their commitment to the Class throughout this litigation by answering document requests and interrogatories, appearing for depositions, and serving as advisors to counsel. Moussouris Dec., ¶ 8; Muenchow Dec., ¶ 8. Counsel for Plaintiffs have also prosecuted this action vigorously—by, *e.g.*, litigating multiple motions to dismiss and motions to compel, and engaging in extensive discovery (over 220,000 documents exchanged and 13 depositions taken) through which counsel have demonstrated their dedication to the Class—and will continue to do so. Shaver Decl., ¶ 4. Further, counsel have extensive experience in prosecuting gender discrimination class actions and will continue to commit the time and resources to represent this Class. Dermody Decl., ¶¶ 4-8; Klein Decl., ¶¶ 4-7, Subit Decl., ¶¶ 6-8.

C. Certification Under Rule 23(b)(2) is Warranted for Liability and Injunctive Relief.

“Rule 23(b)(2) permits class actions for declaratory or injunctive relief where ‘the party opposing the class has acted or refused to act on grounds generally applicable to the class.’ Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (citations omitted). *See also Parsons*, 754 F.3d at 686 (“[T]he primary role of this provision has always been the certification of civil rights class actions.”). In fact, “subdivision (b)(2) was added to Rule 23 in 1966 in part to make it clear that civil-rights suits for injunctive or declaratory relief can be brought as class actions.” Wright & Miller, 7AA *Fed. Prac. & Proc. Civ.* § 1776 (3d ed.).

In *Dukes*, the Supreme Court has explained:

The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them. In other words, Rule

23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant.

Dukes, 564 U.S. at 360 (quotation marks and citation omitted). Here, Plaintiffs seek a declaration that Microsoft's existing Calibration process is unlawful (*i.e.*, declaratory relief), and an order enjoining Microsoft from using it to make pay and promotion decisions in the future. All class members have been subjected to the Calibration process, and an order pronouncing it unlawful and preventing its further use would provide relief to the Class as a whole. Not only would it stop the use of a discriminatory practice, but it would also entitle all Class members to a presumption of make whole relief in the damages phase of the case. *Ellis*, 285 F.R.D. at 505; *Dukes*, 564 U.S. at 352 n.7, 366 (quoting *Teamsters*, 431 U.S. at 361). *See also Parsons*, 754 F.3d at 688 ("[Rule 23(b)(2)'s] requirements are unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole.").⁶²

For exactly these reasons, courts have long recognized that disparate impact and disparate treatment claims for declaratory and injunctive relief are appropriate for certification under 23(b)(2). *See, e.g., McReynolds*, 672 F.3d at 491-92 (certifying (b)(2) class for liability and injunctive relief in disparate impact case); *Houser v. Pritzker*, 28 F. Supp. 3d 222 (S.D.N.Y. 2014) (same); *Easterling v. Connecticut Dep't of Correction*, 278 F.R.D. 41, 47 (D. Conn. 2011)

⁶² *Parsons* is an Eighth Amendment case in which plaintiffs alleged that a class of inmates was subjected to common policies and practices of the Department of Corrections that created a substantial risk of serious harm, injury, or death. 754 F.3d at 663. The common practices that plaintiffs complained of included inadequate staffing, denials of dental care, lack of emergency treatment, failure to stock and provide critical medication, substandard dental care, and failure to provide therapy and psychiatric medication to mentally ill patients. *Id.* The court found that "these policies and practices are the 'glue' that holds together the putative class; either each of the policies and practices is unlawful as to every inmate or it is not." *Id.* at 678. Though not a Title VII case, *Parsons* is still instructive as to the Ninth Circuit's application of the requirements of 23(a)(2) and (b)(2) to class claims for liability and injunctive relief against a common set of policies and practices, as Plaintiffs present here.

(same); *Gulino v. Bd. of Educ. of City Sch. Dist. of City of New York*, 907 F. Supp. 2d 492, 509 (S.D.N.Y. 2012), *aff'd sub nom. Gulino v. Bd. of Educ. of New York City Sch. Dist. of City of New York*, 555 F. App'x 37 (2d Cir. 2014) (same); *Ellis*, 285 F.R.D. at 537 (certifying (b)(2) class for liability and injunctive relief in disparate treatment and disparate impact case); *Scott v. Family Dollar Stores, Inc.*, No. 3:08-cv-00540, 2016 U.S. Dist. LEXIS 105267 (W.D.N.C. June 24, 2016) (same); *Williams*, 225 F.R.D. at 632, 638 (same); *Beck*, 60 F. App'x at *39 (affirming certification of (b)(2) class for liability and injunctive relief in disparate treatment case). The claims in this case also warrant certification for liability and injunctive relief.

D. Certification Under Rule 23(b)(3) is Warranted for Liability and Monetary Damages.

The Supreme Court has clarified that “individualized monetary claims belong in Rule 23(b)(3).” *Dukes*, 564 U.S. at 362. Rule 23(b)(3) requires that common issues predominate over individual issues, and that a class action be superior to other available methods for the fair and efficient adjudication of the case. Fed. R. Civ. P. 23(b)(3). “Predominance is not, however, a matter of nose-counting. Rather, more important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance to the claims of the class.” *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016) (citation omitted).

1. Common Questions of Liability and Damages Predominate Over Individual Damages Issues.

For both Plaintiffs’ disparate impact and disparate treatment claims, common questions of liability and damages predominate over individual damages issues.

With respect to Plaintiffs’ disparate impact claim, whether Microsoft’s Calibration process has a disparate impact on women in pay and promotions, whether that practice is nonetheless justified by business necessity, and whether alternative less-discriminatory practices exist, are common issues which will be proved or disproved using only common evidence. *Ellis*,

1 285 F.R.D. at 538. The first question will be determined based on statistical evidence, and the
 2 second based on common, classwide evidence about the policies themselves, including the
 3 testimony of the parties' Industrial Organizational psychology experts. These common issues of
 4 liability clearly predominate; indeed, "adjudicating these issues on a classwide basis is necessary
 5 before any individualized proceeding can occur." *Id.* See also *Moore v. Napolitano*, 926 F.
 6 Supp. 2d 8, 33-34 (D.D.C. 2013) (holding predominance satisfied where "all members of the
 7 class will rely on the same statistical evidence to make the same [disparate impact] claim");
 8 *Parra*, 291 F.R.D. at 392 (adopting the rationale of *Ellis* and holding that "the common questions
 9 regarding liability as to the pay claim are 'a significant aspect of this case and they can be
 10 resolved for all members of the class in a single adjudication'"); *Easterling*, 278 F.R.D. at 48-49
 11 (certifying liability and damages claims under Rule 23(b)(3) because both prima facie case of
 12 disparate impact and defenses thereto are subject to generalized proof).

13 With respect to Plaintiffs' disparate treatment claim, whether Microsoft operated under a
 14 general policy of discrimination, such that all class members are entitled to a presumption of
 15 discrimination under *Teamsters*, is a common question that will be proved or disproved based on
 16 common evidence. First and foremost, Plaintiffs offer statistical evidence of significant
 17 disparities in pay and promotions for females in Engineering and I/T Operations. Second,
 18 Plaintiffs offer evidence of a pervasive companywide culture that underlies and informs the
 19 Calibration process from which these disparities emerge. Third, Plaintiffs offer evidence that
 20 senior leadership at Microsoft knew of both the disparities and the cultural bias, and failed to
 21 correct them. This evidence is substantial and is common to the class. Similarly, Microsoft's
 22 predicted defense to this claim—that Plaintiffs' statistical evidence is inaccurate or
 23 insignificant—also rests on common evidence. "This pattern and practice question predominates
 24 because it has a direct impact on every class member's effort to establish liability and on every
 25 class member's entitlement to . . . monetary relief." *Ellis*, 285 F.R.D. at 538 (quoting *Ingram v.*
 26 *The Coca-Cola Co.*, 200 F.R.D. 685, 699 (N.D. Ga. 2001). See also *Scott*, 2016 U.S. Dist.

1 LEXIS 105267 at *26 (“[T]he predominance standard of Rule 23(b)(3) is satisfied because
 2 plaintiffs have proffered evidence of class-wide pattern-or-practice and/or disparate impact that
 3 could establish liability, and result in class-wide entitlement to: (1) affirmative injunctive and
 4 declaratory relief to undo the effects of such disparate impact and/or class-wide pattern-or-
 5 practice; and (2) a presumption of individualized harm for each class member.”); *Sellars v. CRST*
 6 *Expedited, Inc.*, No. C15-117-LTS, 2017 WL 1193730, at *21-22 (N.D. Iowa Mar. 30, 2017)
 7 (certifying liability phase of disparate treatment claim under Rule 23(b)(3) and holding that
 8 “[t]he potential need for individual damage calculations at a later stage is typically not decisive
 9 of the predominance factor”).

10 Although every Title VII case presents some individualized questions with respect to
 11 class member entitlement to relief, the Ninth Circuit has long held that individualized damages
 12 issues do not defeat predominance. *See, e.g., Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514
 13 (9th Cir. 2013) (“The amount of damages is invariably an individual question and does not defeat
 14 class action treatment.”) (quoting *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir.1975)). This is
 15 no less true in the Title VII context than any other, as every case cited herein certifying a Title
 16 VII claim makes clear. The Court may deal with damages issues in one of at least two
 17 recognized ways. First, the Court may employ the *Teamsters* framework, whereby individual
 18 class members will present their eligibility for relief in a second phase of trial if liability is
 19 established. Importantly, these “individualized hearings that may be conducted in the second
 20 phase of the trial ‘are narrow in scope and significance when compared to the threshold, class-
 21 wide issues subject to generalized proof.” *Rollins*, 2016 WL 258523 at *15 (quoting *Ellis*,
 22 *supra*). They also are made more efficient by the “presumption of individualized harm for each
 23 class member” afforded by a class victory in the liability phase. *Scott*, 2016 U.S. Dist. LEXIS
 24 105267 at *26. Alternatively, the Court may choose to certify both liability and damages for
 25 class treatment based on the common issues presented with respect to damages, which include:
 26 classwide calculation of baseline backpay on a year-by-year basis; class-wide determination on

1 how to calculate compensation for lost promotions; class-wide establishment of what non-
 2 discriminatory bases Microsoft may use to claim a plaintiff would not have been promoted; and a
 3 class-wide process to collect information from plaintiffs regarding mitigation. *See Gulino v. Bd.*
 4 *of Educ. of City Sch. Dist. of City of New York*, No. 96 CV 8414 KMW, 2013 WL 4647190, at
 5 *11 (S.D.N.Y. Aug. 29, 2013) (certifying liability and damages in disparate impact case under
 6 23(b)(3) where “resolving common issues with respect to damages at a class-wide proceeding
 7 will save substantial time and prevent the relitigation of common claims”). *See also Easterling*,
 8 278 F.R.D. at 48-49 (certifying liability and damages in disparate impact case under 23(b)(3)
 9 because common issues as to damages, including the total amount of back pay that should be
 10 awarded to the class, predominated over individual issues, which included each member’s
 11 eligibility to be in the class and qualification for position).

12 Plaintiffs’ proposed trial plan (set forth below) reflects the Court’s options. While
 13 Plaintiffs believe that both liability and damages should be certified here, at minimum the Court
 14 should certify the liability phase under Rule 23(b)(2), (b)(3) or (c)(4) (issue certification).

15 **2. Plaintiffs Satisfy Superiority.**

16 The superiority inquiry directs the Court to consider four factors—the class members’
 17 interests in controlling litigation, the nature and extent of litigation, the desirability of
 18 concentrating the litigation of the claims, and the manageability of the case as a class action.
 19 Fed. R. Civ. P. 23(b)(3).

20 All four factors readily support certification. Plaintiffs are not aware of any pending
 21 gender discrimination litigation commenced by or against Class members on the same issues.
 22 Class members’ interests are not served by individual suits under their control. As this Court has
 23 recognized, these are “negative value” claims such that the cost of prosecuting them would
 24 exceed the potential income, particularly “against a resource-heavy organization such as
 25 defendants’.” *Beck*, 203 F.R.D. at 466-67. In addition, Class members benefit from remaining
 26 anonymous, rather than risking their reputations and careers by bringing a lawsuit in their own

names. Likewise, Plaintiffs have already conducted extensive discovery and litigation in this forum. It would be far more efficient and convenient to continue litigating common questions here. *Easterling*, 278 F.R.D. at 50.

As for manageability, Plaintiffs' proposed trial plan shows how this case may be efficiently litigated as a class action:

Stage One: Liability

- 1) Disparate Treatment Liability: the parties will litigate whether Microsoft is liable for disparate treatment. This claim will be tried to a jury. Plaintiffs will have the initial burden to show that discrimination was Microsoft's standard operating procedure. If that prima facie case is established, Microsoft will have the opportunity to rebut the Plaintiffs' evidence by showing it to be either inaccurate or insignificant. Whichever party prevails on the preponderance of the evidence will win the liability phase. If Plaintiffs prevail, the jury will determine whether punitive damages should be awarded, but not the amount of punitive damages.⁶³
- 2) Disparate Impact Liability: the parties will litigate whether Microsoft is liable for disparate impact. This claim will be tried to the Court. Plaintiffs have the initial burden to show that Microsoft's Calibration process causes statistically significant pay and promotion disparities for the proposed Class. If Plaintiffs establish their prima facie case, the burden will shift to Microsoft to prove, as an affirmative defense, that its Calibration process is based on legitimate business necessity.

⁶³ See *Ellis*, 285 F.R.D. at 542 ("The Court concludes that while the availability of punitive damages should be adjudicated in Stage One of the trial, determination of the aggregate amount and individual distribution of punitive damages should be reserved for Stage Two. Such an arrangement will take advantage of the bifurcated trial procedure while safeguarding Defendant's right to ensure that any punitive damages award remains tethered to the compensatory damages actually awarded in Stage Two, consistent with *State Farm*."). (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)).

1 Plaintiffs will then have the opportunity to show that Microsoft could have used a
 2 less discriminatory alternative practice.

- 3 3) Result of Verdicts: If Plaintiffs prevail on either claim, the entire class is entitled
 4 to a declaration of liability, a presumption of individual make-whole relief, and,
 5 importantly, a class-wide injunction against the continuation of the discriminatory
 6 practice as well as other reforms that may be fashioned by the Court, if warranted.
 7 The case would then proceed to Stage Two. If Plaintiffs do not prevail on either
 8 claim, the case is over.

9 **Stage Two: Damages**

- 10 1) Option One: The Court first resolves common damages questions, which can
 11 include the aggregate amount of backpay owed to the Class if the Court deems
 12 that approach appropriate. Then the Court (or special master) will hold *Teamsters*
 13 hearings, or use written questionnaires, to narrow and/or adjudicate issues around
 14 individual class members' eligibility for relief, the amount of relief, and share of
 15 punitive damages each is entitled to recover.
 16 2) Option Two: The Court (or special master) will hold *Teamsters* hearings to
 17 adjudicate individual entitlement to backpay and compensatory damages, as well
 18 as the individual's share of any punitive damages.

19 This proposed trial plan follows a well-trodden path in Title VII class litigation, both
 20 before and after *Dukes*. See, e.g., *Teamsters*, 431 U.S. at 361; *Ellis*, 285 F.R.D. at 505; *Robinson*
 21 *v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 161 (2d. Cir. 2001); *U.S. v. City of New York*,
 22 276 F.R.D. 22, 32-33 (E.D.N.Y. 2011); *Velez v. Novartis Pharma. Corp.*, 244 F.R.D. 243, 243
 23 (S.D.N.Y. 2007).

IV. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant the motion for class certification, certifying liability issues under Rule 23(b)(2), (b)(3), and/or (c)(4); injunctive relief under Rule 23(b)(2); and damages under Rule 23(b)(3).

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